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THOMAS F. McFARLAND

January 19, 2004

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

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Re: Docket No. AB-33 (Sub-No. 132X), *Union Pacific Railroad Company --
Abandonment Exemption -- in Rio Grande and Mineral Counties, CO*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply in Opposition to Petition to Reopen Decision Served May 11, 1999, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Denver & Rio Grande
Railway Historical Foundation

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BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD)
COMPANY --ABANDONMENT) DOCKET NO. AB-33
EXEMPTION -- IN RIO GRANDE AND) (SUB-NO. 132X)
MINERAL COUNTIES, CO)

REPLY IN OPPOSITION TO
PETITION TO REOPEN
DECISION SERVED MAY 11, 1999

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
1474 Main Avenue, Suite 223
Durango, CO 81301

Replicant

ENTERED
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Public Record

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DATE FILED: January 20, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD)	
COMPANY --ABANDONMENT)	DOCKET NO. AB-33
EXEMPTION -- IN RIO GRANDE AND)	(SUB-NO. 132X)
MINERAL COUNTIES, CO)	

**REPLY IN OPPOSITION TO
PETITION TO REOPEN
DECISION SERVED MAY 11, 1999**

Pursuant to the Board's procedural decision served November 3, 2003, as supplemented by decisions served November 26, 2003 and December 19, 2003, Denver & Rio Grande Railway Historical Foundation (the Foundation), a Class III rail carrier, hereby replies in opposition to a pleading filed by the City of Creede, Colorado (the City) on October 14, 2003, as supplemented on December 2, 2003, which is being treated by the Board as a Petition to Reopen a Board decision in this proceeding served May 11, 1999 (the 1999 Decision).

BACKGROUND

By virtue of the 1999 Decision, the Foundation was authorized to acquire a 21.6-mile rail line between Derrick and Creede, Colorado from Union Pacific Railroad Company (UP) pursuant to the offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904. Another OFA to acquire the line had been filed by Rio Grande & San Juan Railroad Co. (RGSJ). Pursuant to 49 C.F.R. § 1152.27(l)(1), UP chose to negotiate with the Foundation rather than RGSJ for acquisition of the line.

The City doesn't want a railroad in town. It has gone to extraordinary lengths to attempt to prevent a railroad presence in Creede. Its initial effort in that respect was a "protest" filed with

the Board on November 26, 1999, more than six months after the Board's approval of the Foundation's acquisition. The Board treated that pleading as a petition to reopen the 1999 Decision under 49 C.F.R. § 1115.4. The principal arguments in the City's 1999 petition were that (1) the rail line is not subject to Board jurisdiction because it was *de facto* abandoned under Colorado law as a result of nonuse for a lengthy period; and (2) the Foundation lacks the financial ability to purchase, rehabilitate and operate the rail line.

The City's 1999 petition was denied in a Board decision served May 24, 2000 (2000 Decision). The Board found that federal law governs abandonment of rail lines, and that under federal law a rail line is not *de facto* abandoned as a result of nonuse (2000 Decision at 4-5). The Board found that the City failed to provide persuasive evidence that the Board erred in finding that the Foundation is financially responsible (*id.* at 4).

On May 24, 2000, the Foundation's acquisition of the rail line from UP was consummated.

On November 2, 2000, the City filed an action against the Foundation in the District Court for Mineral County, Colorado, seeking a declaration that a City ordinance providing for residential zoning applies to the Foundation's railroad right-of-way in Creede except for 25 feet of width in the center of that right-of-way. *City of Creede v. Denver & Rio Grande Railway Historical Foundation*, Dist. Ct., Mineral Cty., Colo., No. 00-CV-4. That case was removed to the United States District Court for the District of Colorado. *City of Creede v. Denver & Rio Grande Railway Historical Foundation*, D., Colo., Civil No. 01-RB-318 (CBS).

On May 1, 2002, the City filed a motion for leave to amend its complaint in the United States District Court to add claims that (1) the Board's approval of the Foundation's acquisition

of the line under the OFA was invalid; and (2) the Foundation does not have the financial ability to establish interstate rail freight service on the line. In an order entered on October 16, 2002, U.S. District Court Judge Blackburn denied that motion on the ground that the District Court does not have jurisdiction to modify or set aside the Board's approval of the Foundation's acquisition of the line pursuant to the OFA.

In an order entered May 9, 2003, Judge Blackburn directed that specified issues be referred to the Board in conjunction with the Foundation's defense of federal preemption of the City's zoning ordinance as attempted to be applied. The City had asked the Court to include in the referral questions about the validity of the Board's approval of the Foundation's OFA and the Foundation's rights under the OFA. In refusing to do so, the Court reiterated the absence of District Court jurisdiction to modify or set aside the Board's action in the OFA proceeding, and held that "referral of these questions to the STB by this court is not appropriate" (order entered May 9, 2003 at 5).

On July 2, 2003, the City filed a Petition for Declaratory Order in which the issues identified by Judge Blackburn were presented to the Board for resolution. That Petition was docketed as Finance Docket No. 34376, *City of Creede, Colorado - Petition for Declaratory Order*.

Judge Blackburn's order for referral directed the parties to provide the Board with copies of relevant portions of the Court record. On October 14, 2003, the City transmitted over 400 pages of the Court record to the Board, together with a 30-page pleading contending that the Board should void the Foundation's OFA acquisition of the line. Most of the record filed by the City relates to the Foundation's acquisition of the line under the OFA and post-acquisition

activities, and has nothing to do with issues involving application of the City's zoning ordinance. The City's submission of those documents and its pleading seeking to void the OFA acquisition were filed in utter defiance of Judge Blackburn's refusal to refer issues regarding the OFA acquisition to the Board and are contrary to the Judge's order that "relevant" record matter be filed with the Board. Although the City's pleading and most of the record matter that it filed undoubtedly were subject to being stricken on that basis, the Foundation instead suggested that the City's pleading be treated as a petition to reopen the Board's 1999 Decision in the acquisition proceeding so that the City's arguments would be disposed of on a final basis. The Board treated the City's October 14, 2003 pleading as a Petition to Reopen the Board's 1999 decision (decision served November 3, 2003).

As is evident from the foregoing, over the past four years the City has been on a crusade to undo the Board's approval of the Foundation's acquisition of the rail line, before both the Board and the United States District Court. Ironically, the City pursued relief everywhere but at the proper forum on a timely basis, which was at the United States Court of Appeals for judicial review of the Board's decision in the OFA proceeding within 60 days after entry of the decision. (See 28 U.S.C. §§ 2342(5), 2344). Now the City seeks administrative review for a second time -- this time 3½ years after the OFA acquisition was consummated -- based on alleged "new" evidence developed more than two years ago in a judicial case that has nothing to do with the Foundation's OFA acquisition. The City's vendetta against the Board, UP and the Foundation should be brought to an end once and for all by means of a Board decision that emphatically denies the City's Petition.

APPLICABLE LEGAL PRINCIPLES

The City once again seeks administrative review of a decision that approved acquisition of a rail line under the OFA provisions of 49 U.S.C. § 10904. The City's second Petition is filed 3½ years after the approved acquisition was consummated.

The OFA statute is designed to preserve rail service for the benefit of the shipping public on rail lines that otherwise would be abandoned, while ensuring that rail carriers who own such lines receive at least fair market value as compensation for their acquisition. 49 U.S.C. §§ 10904(d), (f)(1)(B); H.R. Rep. 96-1430 at 125 (96th Cong., 2d Sess., Comm. on Conf., S. 1946, Sept. 29, 1980). The statute is not to be used by parties other than the offeror and offeree who attempt to use it to prevent rail service contrary to its intended purpose. *Consolidated Rail Corp. -- Aband. Exempt. -- in Erie County, NY*, 1998 STB LEXIS 777 at 5-6 (STB Docket No. AB-167 [Sub-No. 1164X], decided Sept. 28, 1998); *aff'd sub nom. Buffalo Crushed Stone, Inc. v. STB*, 194 F.3d 125, 130 (D.C. Cir. 1999).

Third parties attempting to misuse the OFA statute to prevent rail service lack standing to seek review of agency action approving OFA acquisitions because they are not injured by the agency's action. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). That is so because the new rail operator under the OFA statute is merely a successor-in-interest to the license held by the previous rail carrier. The OFA acquirer thus stands in the shoes of the selling rail carrier. The OFA acquisition does not have an adverse effect on third parties because the new rail carrier has the same rights and obligations as the prior rail carrier. *Napa Valley Wine Train, Inc. - Petition for Declaratory Order*, 4 I.C.C.2d 720, 727-728 (1988) ("*Napa Valley*") ("... [the previous carrier] could have added passenger operations without seeking regulatory approval ...

(I)n any instance where the previous carrier could have performed a particular service without seeking additional authority, the new operator . . . should be able to also . . .”). Such a third party would also lack standing under the requirement of redressability where more than one offeror had properly invoked the OFA statute because even if the OFA acquisition of one such offeror were to be revoked, the OFA of the other offeror would then be entitled to consideration. See 49 U.S.C. § 10904(f)(3); c.f. *Canadian National Ry. Co. -- Trackage Rts. Exempt. -- Bangor and A.R. Co.*, 2002 STB LEXIS 375 at *12-13 (STB Finance Docket No. 34014, decision served June 25, 2002).

Even where review of a decision approving an OFA acquisition is permissible, the scope of such review of a consummated acquisition is extremely narrow. A decision that has resulted in a consummated rail line acquisition is reviewable only for fraud, mistake or ministerial error. Such a decision is not reviewable for material error, new evidence or changed circumstances. In *Napa Valley, supra*, the Board’s predecessor referred to the predecessor of 49 U.S.C. § 722(c), which provided for reopening of a proceeding at any time because of material error, new evidence or substantially changed circumstances, and said (4 I.C.C.2d at 729):

. . . However, the Commission has never viewed that authority as limitless. Rather, the need for administrative finality weighs heavily where, as here, a party has acted in reliance on a Commission decision, making a substantial investment. Hence, the circumstances in which jurisdiction reasonably can be reasserted are considerably more circumscribed. Fraud, mistake and ministerial error are the only grounds traditionally asserted by the Commission as a basis for revoking authority already exercised . . . (footnote omitted; emphasis added).

Accord: CSX Transp., Inc. -- Aband. -- between Bloomingdale and Montezuma, in Parke County, IN, 2002 STB LEXIS 535 at *9-11 (ICC Docket No. AB-55 [Sub-No. 486], decision served September 13, 2002), *aff’d sub nom. Montezuma Grain Co. v. STB*, 339 F.3d 535 (7th Cir. 2003).

The greater the delay before filing a petition to reopen, the stronger does equity dictate denial of the petition. In *S.R. Investors, Ltd. -- Aband. -- in Tuolumne County, CA*, 1987 ICC LEXIS 218 (ICC Docket No. 239X, decided July 14, 1987), the Board's predecessor denied a petition to reopen that was filed sixteen months after the effective date of the decision sought to be reopened. In doing so, the ICC said (at *27-28):

There are also strong equitable reasons for not reopening this proceeding. These include the substantial amount of time that has passed from the time Sierra's abandonment was exempted (February, 1985) to the time that Friends' petition to reopen was filed (June, 1986), and in addition, the good faith reliance by Sierra and LPC on the exemption authority in abandoning and purchasing, respectively, the right-of-way. We also emphasize that both the California SHPO and Friends had actual notice of Sierra's exemption, but that Friends, the SHPO and other California agencies all slept on their rights.

Objections to agency proceeding(s) should be made while the agency has the opportunity for correction. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). As the Supreme Court there concluded (*Id.*):

(s)imple fairness to those who are engaged in the tasks of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate in practice.

Accord: Rule 60(b)(3) of the Federal Rules of Civil Procedure, which precludes relief from a U.S. District Court judgment based on fraud or misrepresentation if the request for relief is not filed within one year after entry of the judgment.

In order to grant a petition to reopen on the basis of fraud where the proceeding has resulted in a consummated transaction, the Board would have to find not only that the request for approval of the transaction contained information that was materially false or misleading, but also that the Board relied on that information in approving the transaction. *Southern Pacific*

Transp. Co. -- Exempt. -- Abandonment in Fort Bend County, TX, 1987 ICC LEXIS 189 at *6 (ICC Docket No. AB-12 [Sub-No. 110X], decided Aug. 4, 1987).

The scope of review here is even more circumscribed in light of the Board's narrow role in processing OFAs under 49 U.S.C. § 10904. The Board decides only whether the OFA statute has been properly invoked, i.e., whether one or more financially responsible persons has offered financial assistance on a timely basis. 49 U.S.C. §§ 10904(c), (d)(1). The current OFA statute does not continue a requirement of the prior statute that the Board find that an OFA is "bona fide", i.e. for continued rail service. *Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. 10903*, 1 S.T.B. 894, 911 (1996). The Board has no discretion to deny an acquisition once it is found that the OFA statute has been properly invoked; the Board must authorize an OFA acquisition whenever the parties agree on the financial terms of the acquisition or the offeror is willing to meet the financial terms set by the Board. *Napa Valley, supra*, 4 I.C.C.2d at 727.

It follows that if review of a decision resulting in a consummated acquisition under the OFA statute is permissible, the decision is reviewable for fraud, mistake or ministerial error only in regard to either the financial responsibility of the offeror or the timeliness of its offer. Financial responsibility refers to the ability of the offeror to fund the acquisition and operate the line for 2 years as required by 49 U.S.C. § 10904(f)(4). *2000 Decision* at 4. Where an offeror is found to be financially capable of paying the purchase price for the line, its capability to conduct operations for 2 years is presumed in the absence of persuasive evidence to the contrary (*Id.*).

Third parties opposed to consummated OFA acquisitions are not without a legal remedy as to allegations of unlawfulness in regard to matter for which review is not permissible, or that is beyond the scope of legitimate review, in an OFA proceeding. Such allegations can be raised

in an application for adverse abandonment of the offeror's federal operating authority under 49 U.S.C. § 10903 as a prelude to attempted ejectment of the offeror from the line under State law. *See Canadian National Ry. Co. -- Trackage Rts. Exempt. -- Bangor and A.R. Co., supra*, 2002 STB LEXIS 375 at *12-13.

ARGUMENT

I. The Petition Should Be Denied Because the OFA Statute Cannot Be Used By The City To Prevent Rail Service

In consummating the Board-approved OFA acquisition, the Foundation agreed to preserve the availability of rail service for the shipping public on the Creede Branch, and UP acknowledged receipt of at least fair market value as compensation for the acquisition. Consummation of the acquisition by the offeror and offeree thus was in accordance with the purpose of the OFA statute. *See* 49 U.S.C. §§ 10904(d), (f)(1)(B).

The City is neither offeror nor offeree in regard to the OFA acquisition, but rather is a third party. The City's acknowledged goal here is to use the OFA statute to prevent the availability of rail service in Creede, i.e., to persuade the Board to rescind the OFA acquisition for noncompliance with the requirements of the OFA statute. The Petition should be denied because the City's use of the OFA statute to prevent rail service is contrary to the purpose of the statute.

In Consolidated Rail Corp. -- Aband. Exempt. -- in Erie County, NY, supra, Conrail invoked the class exemption for abandonment of out-of-service rail lines to abandon a line in Erie County, NY. The line was then acquired by R.J. Corman Railroad Company (RJC�) pursuant to the OFA statute. Eighteen months later, Buffalo Crushed Stone, Inc. (BCS) filed a

petition to revoke both the exemption for abandonment and the OFA acquisition on the ground that Conrail had falsely certified that no local traffic had moved over the line in the previous two years, whereas BCS had shipped three local carloads from the line in that period. In denying BCS's petition, the Board said (1997 STB LEXIS 777 at 5-6, emphasis added):

... Were we to revoke the exemption as requested by BCS, our action not only would adversely affect Conrail, but it would also negate a purchase by an innocent third party, RJCN, which invoked section 10904 in the good faith belief that, if it complied with the statutory standards and procedures, it would acquire the line. To hold otherwise would not only work unjustifiable injury to bona fide purchasers such as RJCN, but also would undermine section 10904. Purchasers acquiring lines under that provision would have to worry that their rights to the lines they acquire might be abrogated months and perhaps years later because of some defect in the underlying abandonment.

Our practice of revoking abandonments authorized pursuant to the class exemption is predicated on the need to maintain the integrity of the applicable regulations. But that purpose is not served when upholding the class exemption can only be achieved at the expense of derogating section 10904 of the statute (footnote omitted).

In upholding the Board's decision in that proceeding, the Court of Appeals in *Buffalo Crushed Stone, Inc. v. STB*, *supra*, said (194 F.3d at 130):

... (T)he Board's action preserved the integrity of section 10904's OFA procedures, protected a bona fide purchaser, and promoted the goals of the statute. . .

The case for refusing to permit the OFA statute to be misused is stronger in the present case than in the cited case because there the relief sought would have indirectly resulted in rescission of an OFA acquisition whereas here the City is attempting to use the OFA statute directly to revoke a consummated OFA acquisition.

The inappropriateness of the City's attempted use of the OFA statute is illustrated by the City's lack of judicial standing to challenge the Board's denial of the Petition to Reopen. The

City lacks standing because it has not been injured as a result of the Foundation's OFA acquisition of the rail line, and because the injury that it alleges would not be redressed even if its Petition were to be granted. The City has not been injured by the Foundation's OFA acquisition because the only effect of that acquisition has been to put the Foundation into UP's shoes. UP could have restored rail freight service and provided rail passenger service over the Creede Branch at anytime without STB authority. As successor-in-interest to UP's operating license, the Foundation is lawfully authorized to provide the same rail freight and passenger service that UP was authorized to provide. As the ICC put it in *Napa Valley, supra*, 4 I.C.C.2d at 727-728:

... (I)n any instance where the previous carrier could have performed a particular service without seeking additional authority, the new operator (which simply stands in [the previous carrier's] shoes) should be able to also (footnote omitted) ...

Even if the City had been injured as a result of the Foundation's OFA acquisition of the rail line, that injury would not be redressed if the City's Petition were to be granted. Two OFAs were timely filed in this case: the Foundation's and another by RGSJ. Even if the Foundation's OFA acquisition were to be rescinded in response to the City's Petition, the OFA of RGSJ would be entitled to consideration at that time. *See* 49 U.S.C. § 10904(f)(3); 49 C.F.R. § 1152.27(l)(3). The City thus could prevail in its Petition and still face the prospect of rail service in Creede.

The upshot of all of the foregoing is that the Board should not permit an entity who is neither offeror nor offeree in an OFA transaction to misuse the OFA statute to prevent the availability of rail service in a manner directly contrary to the purpose of the statute to preserve rail service. The City's Petition should be summarily denied on that basis.

II. The Petition Should Be Denied Because There Has Been No Showing That The Board's Finding That The Foundation Is Financially Responsible Is Based On Fraud

If the City's Petition is not denied on the ground that the City's attempted use of the OFA statute is legally impermissible, the Petition nevertheless should be denied because no basis for reopening was established within the narrow scope of review of a consummated OFA acquisition.

As established in *Napa Valley, supra*, the City's claims for relief based on material error, new evidence and changed circumstances are not entitled to consideration because they are beyond the legitimate scope of review of a decision that has resulted in a consummated OFA acquisition of a rail line.

There is no claim that the Board's decision is based on mistake or ministerial error. That leaves fraud as the only cognizable ground for relief. There is no contention that fraud precipitated the Board's finding that the Foundation's OFA was timely filed. That leaves the Foundation's financial responsibility as the only cognizable finding at issue.

In sum, the extremely narrow issue raised by the City's Petition is whether or not the Board's finding that the Foundation is financially responsible is based on fraud. The Petition does not contain a showing that it is.

The overriding point here is that the City's claim of fraud is thoroughly undermined by evidence furnished by UP that the Foundation is current in its financial obligations to UP for purchase of the rail line. In conjunction with its Petition, the City inquired of UP whether the Foundation is in default in its financial obligations for purchase of the line. In responding that the Foundation is current in its obligations, UP stated that the Foundation paid UP \$350,000 of

the \$624,616 purchase price in cash at closing, and that the Foundation is not in default on its promissory note for the balance (VS Shank at 1-2, Appdx. DHS-2). How could the Foundation be found to have fraudulently misrepresented its ability to pay for the rail line when the seller has provided evidence that the Foundation has honored all of its obligations for payment?

Even apart from the evidence furnished by UP, there is no showing in the City's Petition that the Foundation fraudulently misrepresented its ability to pay for the rail line. In its OFA filed April 2, 1999, the Foundation represented that it had the ability to pay the purchase price that it offered, i.e., \$387,930 (OFA at 3). The Foundation's President, Mr. Donald H. Shank, supported that offer with a pledge of \$400,000 to the Foundation (*id.*, Appdx. 2). A statement of Mr. Shank's financial condition was filed with the OFA (*id.*, Appdx. 3). That statement listed cash, notes receivable, investments and other assets by which Mr. Shank could make good on his pledge (*id.*).

In finding that the Foundation is financially responsible, the Board relied on Mr. Shank's pledge and the statement of his financial condition. (Decision served April 6, 1999 at 2-3; 2000 Decision at 4). The City has argued that some components of Mr. Shank's financial statement were listed without a sufficient factual basis. However, even if that is assumed to be the case, there was no fraudulent misrepresentation here. The Board relied on the pledge and the financial statement as a whole, not on individual components of that statement. The inaccuracy of a component of Mr. Shank's financial statement would not support a finding of fraud where the Board did not rely on that component in finding that the Foundation is financially responsible. *See Southern Pacific Transp. Co. -- Exempt. -- Abandonment in Fort Bend County, TX, supra*, 1987 ICC LEXIS 189 at *6.

The absence of fraud is shown conclusively by the fact that Mr. Shank has actually made contributions to the Foundation in an amount considerably greater than the amount of his pledge, i.e., contributions totaling \$506,028 compared to the pledge of \$400,000 (VS Shank at 2, Appdx. DHS-3). The funding provided by Mr. Shank includes \$100,000 in cash toward the purchase price of the line and the purchase of extensive equipment for rehabilitation of the rail line and for freight and passenger operations (VS Shank at 2; Appdx. DHS-4).

The City has also argued that the Foundation does not have the financial ability to pay the balance of the purchase price, nor to rehabilitate and operate the rail line. However, there cannot have been fraudulent misrepresentations by the Foundation in regard to those matters because the Foundation was not required to make representations on those subjects in its OFA, and did not do so. The sole extent of the Foundation's financial representations in its OFA was that it had the financial ability to pay the amount that it offered as the purchase price for the line (\$387,930). In the absence of fraud, the City's allegations regarding the balance of the purchase price and funds for rehabilitation-operation are beyond the legitimate scope of review in this proceeding.

In sum, the City has not shown fraud in the Board's finding that the Foundation is financially capable of paying the purchase price for the line. The City's Petition should be denied on that basis.

COMMENTS OF ELK CREEK RANCH, INC. AND WASON RANCH CORPORATION

On December 19, 2003, Elk Creek Ranch, Inc. and Wason Ranch Corporation, referred to by themselves as "Adjacent Land Owners," filed Comments in support of the City's Petition to Reopen. Those Comments should have been filed at the time of filing of the Petition as a part of

the Petition. However, those Comments add nothing of substance to the Petition. The Adjacent Land Owners have attempted to misuse the OFA statute to torpedo the OFA, just as did the City. The Adjacent Land Owners have no better standing to do so than does the City. Consummation of the acquisition and UP's assurance that the purchase terms have been complied with refute the Adjacent Land Owners' claim of fraud in conjunction with the Foundation's financial representations. The expression of shipper need for freight service filed with this Reply refutes their claim of fraud in conjunction with intention to provide rail freight service.

Like the City, the Adjacent Land Owners have made numerous false and misleading statements about the Foundation and about Mr. Shank personally. Most of those statements have no bearing on whether the City's Petition should be granted or denied. Nevertheless, Mr. Shank has responded to them to set the record straight. (VS Shank, Appd. DHS-8).

CONCLUSION AND REQUESTED RELIEF

What the Interstate Commerce Commission said in *Potomac Electric Power Co. v. Penn Central Transp. Co.*, 358 I.C.C. 473 (1978), at 15-16, is applicable to the case at hand:

There must be finality to litigation. To grant defendant's petition would be to invite relitigation of an issue which has been thoroughly explored in an already overlong proceeding. We will not unduly prolong the administrative process . . .

The City and its allies could have sought judicial review of the Board's decision in the OFA proceeding. Having failed to do so, those parties cannot attack the OFA decision years later after the decision has led to a consummated acquisition. Instead, the only remedy available to them to attempt to oust the Foundation from the rail line is an application under 49 U.S.C. § 10903 for involuntary abandonment. The City and its allies have not sought that relief because it is evident

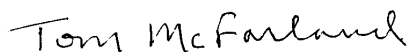
that they would not be able to prove that abandonment by the Foundation is permitted by public convenience and necessity.

WHEREFORE, the City's Petition should be denied on one or both of the grounds identified in this Reply.^{1/}

Respectfully submitted,

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
1474 Main Avenue, Suite 223
Durango, CO 81301

Replicant



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DATE FILED: January 20, 2004

^{1/} The City would not be left without a remedy if it continues to believe that the Foundation is unable or unwilling to provide rail freight service on the line. The City can file an application for adverse abandonment under 49 U.S.C. § 10903 on that basis as a prelude to seeking to remove the Foundation from the line under State law. However, that remedy would appear to have no better chance of success than the City's Petition here. Mr. Shank has provided evidence of a demand for rail freight service on the line, and has shown that the Foundation is well on the way to completing rehabilitation of the line as a prelude to begin operations (VS Shank at 2-4).

Docket No. AB-33 (Sub-No. 132X)

VERIFIED STATEMENT OF DONALD H. SHANK

My name is Donald H. Shank. I am President, Board Chairman, incorporator and founder of Denver & Rio Grande Railway Historical Foundation (the Foundation). My business address is 1474 Main Avenue, Suite 223, Durango, CO 81301.

The Foundation is a Class III rail common carrier subject to the jurisdiction of the Surface Transportation Board (the Board). By virtue of a Board decision in its Docket No. AB-33 (Sub-No. 132X), issued May 11, 1999, the Foundation was authorized to acquire from Union Pacific Railroad Company (UP) a 21.6-mile rail line between Derrick and Creede, Colorado (the Creede Branch). The Board's authority was issued in response to an offer of financial assistance (OFA) filed by the Foundation on April 2, 1999.

On May 24, 2000, the Foundation's acquisition of the Creede Branch from UP was closed. Attached to this Statement as Appendix DHS-1 is a copy of a letter from the attorney for UP to the Board, dated May 26, 2000, confirming consummation of the acquisition as of May 24, 2000.

I understand that the City of Creede, Colorado (the City) recently inquired of UP whether the Foundation is in default of any of its financial obligations in regard to purchase of the Creede Branch. Attached to my Statement as Appendix DHS-2 is a copy of UP's response to that inquiry, dated November 26, 2003. The UP's response shows that the Foundation is current in its financial obligations. Specifically, the UP response shows that the Foundation paid UP

\$350,000 of the \$624,616 purchase price for the Creede Branch in cash at closing, and that the Foundation is not in default in regard to payment of its promissory note for the balance.

Attached to my Statement as Appendix DHS-3 is a copy of a statement of contributions made by me to the Foundation, as compiled by the Foundation's bookkeeper, Rosemary Beckwith & Associates, 359 Main Street, Suite 3, Grand Junction, CO 81501, (970) 263-4118. The statement of contributions shows that I have contributed a total of \$506,028 to the Foundation as of the end of 2002. That amount included \$100,000 in cash toward payment of the purchase price for the line and additional amounts for equipment for track rehabilitation and freight and passenger operations. Appendix DHS-4 attached to my Statement is a listing of the Foundation's equipment inventory.

The Foundation has received requests for rail freight service over the Creede Branch. Attached to my Statement as Appendix DHS-5 is a letter to the Foundation dated November 21, 2003 from Randy Parsons, Operations Manager, GMCO Corporation, Rifle, CO, requesting rail service to Creede to ship 25 cars per year for dust control in the Creede area. Attached to my Statement as Appendices DHS-6 and DHS-7, respectively, are letters to me from Danny Rogers, Mineral County Road & Bridge Supervisor, dated November 20, 2003 (Appdx. DHS-6), and from Robert Hurd, Hinsdale County Road & Bridge Supervisor, dated June 25, 2003 (Appdx. DHS-7), requesting delivery of magnesium chloride in tank cars by rail at Creede, CO. Mineral County and Hinsdale County would be the receivers of the rail shipments that would be made by GMCO Corporation.

Although the Foundation's ability to complete rehabilitation of the rail line has been impeded by constant litigation against the Foundation by the City of Creede, Colorado, the Foundation nevertheless has made substantial progress in rehabilitation as a prelude to reinstituting rail service.

The Foundation has cleared all 21.6 miles of track. The Creede Branch had been totally overgrown with aspen trees and weeds. The Foundation has removed thousands of trees, tons of brush, hundreds of pine trees, and thousands of "chicos", a dense scrub-brush with a difficult-to-remove root-ball. The Foundation has cleared numerous rock slides, some over a mile long. The Foundation has replaced rock cribbing and has shored up the roadbed where it is adjacent to a river.

On the track itself, the Foundation has installed hundreds of crossties, and has replaced numerous rail lengths, angle bars, tie plates and spikes. We have installed gauge-bars in many locations prior to rail and crosstie replacement to maintain the gauge. The majority of the Branch has been brought back into gauge. The Foundation has completely replaced three road crossings, and has installed a new crossing at South Fork, CO. All other crossings have been cleared and made safe for both railroad employees and the motoring public except those in Creede, where the City refuses to honor its crossing agreements.

The Foundation has removed tons of snags and debris from around the pilings and supports at the numerous railroad bridges and trestles over the Rio Grande River.

The Foundation is acquiring #1 quality relay ties for additional crosstie replacement. We have purchased a tamper, scarifier, regulator, tie inserter and remover, spiker and auto-gauger.

We have twenty 55-gallon drums full of new spikes and several pallets of tie plates. We have purchased new high-visibility crossbuck signs that will be installed in the coming Spring.

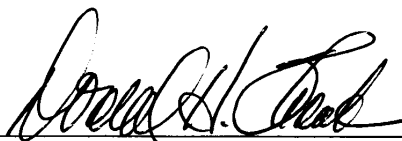
Anyone who contends that the Foundation is not willing and able to provide rail service over the Creede Branch is either not aware of, or has ignored, what the Foundation has accomplished in repair of the track structure to enable restoration of rail service. The City of Creede is well aware that the Foundation intends to revive rail service over the Branch, and is capable of doing so. That is why the City has tried so hard to prevent the Foundation from succeeding.

Both the City, Elk Creek Ranch, Inc. and Wason Ranch Corporation (the last two have called themselves "Adjacent Land Owners") have made numerous allegations about the Foundation and about me personally that are false and/or misleading. My attorney has advised me that most of those allegations are not relevant to the issue of whether the decision approving the Foundation's OFA should be reopened. Nevertheless, I would like to respond to those inappropriate statements in order to set the record straight. Attached to my Statement as Appendix DHS-8 is my rebuttal of the false and misleading statements made in the Comments of the Adjoining Landowners. The false and misleading statements in the City's Petition are essentially the same as those contained in the Landowners' Comments. I addressed the Landowners' Comments because the false and misleading statements were made more clearly in those Comments than in the City's Petition.

VERIFICATION

STATE OF COLORADO)
) SS:
COUNTY OF RIO GRANDE)

DONALD H. SHANK, being duly sworn on oath, deposes and states
that he has read the foregoing statement, that he knows the contents thereof,
and that the facts therein stated are true and correct.

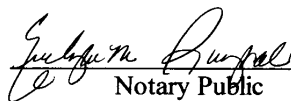


DONALD H. SHANK

SUBSCRIBED AND SWORN to

before me this 15th day of

January, 2004.



Notary Public

My Commission Expires: 6/2/07

Law Department

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
ROOM 830
OMAHA, NEBRASKA 68179-0001
FAX (402) 271-5610



May 26, 2000

Appdx. DHS-1

**VIA FAX (202) 565-9002 and
UPS OVERNIGHT**

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company --
Abandonment Exemption -- In Rio Grande and Mineral Counties, CO;
Notice of Consummation of § 10904 Sale

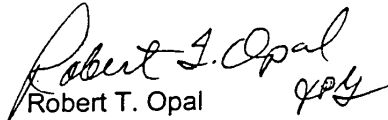
Dear Mr. Williams:

This refers to the Board's decision dated May 11, 1999 authorizing the Denver & Rio Grande Historical Foundation (D&RGHF) to acquire the above line under 49 U.S.C § 10904. The decision also dismissed the abandonment exemption, effective on the date the sale is consummated.

This letter is to advise that the sale of the above line to D&RGHF was consummated on May 24, 2000.

An additional 10 copies of this letter are enclosed for the Board's files. Please indicate receipt by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Very truly yours,


Robert T. Opal
General Commerce Counsel
Direct dial: (402) 271-3072
Fax: (402) 271-5610

cc: (via fax)
Thomas McFarland, Esq. [312-201-9695]
Donald Shank [970-590-0202]

Law Department

UNION PACIFIC RAILROAD COMPANY

Appdx. DHS-2
(2 pages)



November 26, 2003

RECEIVED

DEC 01 2003

MOFARLAND

**Via Fax (970) 369-1009 and
First Class Mail**

George M. Allen, Esq.
206 Society Drive
Telluride, CO 81435

RE: STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad
Company – Abandonment Exemption – In Rio Grande and Mineral
Counties, CO

Dear Mr. Allen:

This refers to your letter of November 14, 2003 requesting that I furnish you with certain information by "a week from next Tuesday, November 24" (i.e., December 2)

I am, frankly, puzzled by your request. You state that you desire the requested information "in order to make appropriate use of [this] information in the STB's proceedings relevant to our request that the OFA rights obtained by the Foundation be rescinded..." However, you have already made the only evidentiary submission you are permitted to make in the "rescission" proceeding under the Board's Rules of Practice. That was the "City of Creede's Submission of Materials Compiled During U.S. District Court Proceedings" filed October 14, 2003 (which the Board, in its decision served November 3, 2003, treated as a petition to reopen). The Foundation and UP are permitted to submit a reply to the City's submission, and the record is then closed. The City is not permitted to submit a reply to these replies, see 49 C.F.R. 1104.13.

Nevertheless, without waiving any objections UP may have to discovery, we are responding as follows:

Question

The agreed purchase price for the sale of the Creede line to the Foundation was \$624,616, which was settled at closing as follows:

Cash paid by Foundation to UP..... \$350,000

Note by Foundation to UP..... \$274,616

The answers to your specific questions are as follows:

- A. The note described above is not yet due. The current payment schedule provides for payments in equal installments on March 2, 2005 and September 2, 2005.
- B. Not applicable
- C. See answer to 'A'
- D. UP has not written off any part of the payments owed to UP by the Foundation.

Documents

UP declines to provide the requested documents.

* * * *

Finally, with respect to your threat to seek "formal discovery", we would regard any discovery from your client, particularly at this late date, as an abuse of STB and District Court discovery processes. Accordingly, we will vigorously oppose any such discovery and we reserve the right to seek sanctions against your client.

Very truly yours,



Robert T. Opal
General Commerce Counsel
Direct dial: 402/ 271-3072
Fax: 402/ 271-5610

cc: Thomas F. McFarland, Esq. (via Fax)
Raymond P. Mickelwright, Esq.

CONTRIBUTIONS MADE BY DONALD SHANK			
1999	2000	2001	2002
265,479.00	100,000.00	72,545.00	68,004.00
Total Year ending 2002			<u>506,028.00</u>

Note: The above numbers are a combination of equipment purchased and contributions of cash to the Foundation. The contributions of cash were to cover the Foundations operating expenses and to purchase additional equipment.

DJ's Bookkeeping Service
P.O. Box 342
Mesa, CO 81643
(970) 261-0274

To Whom it May Concern:

Donald Shank was the primary contributor for the Foundation. During 1999 & 2000 the contribution was used for the purchase of the Railway and rehabilitation of the Railway line. During 2001 & 2002 contributions went to lawyers fees and rehabilitation of the Railway line and Railway equipment. The Foundation has had support from other contributors over the past four years.

If you need further information, please call.

I, Denise L. Ransford, certify that the above statement is true and the facts are as they were represented to the Internal Revenue Service.

Denise L. Ransford
Name

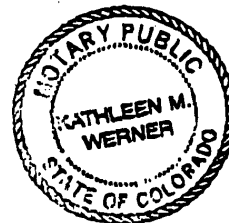
12-11-03
Date

Subscribed and sworn to be this 11 day of December, 2003,
by Denise L. Ransford.

Witness my hand and official seal.

Kathleen M. Werner
Notary Public

My Commission Expires : 4/26/06



DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Appdx. DHS-4
(9 pages)

F.T.I.N. #: 84-1433680

COLORADO CHARITABLE REGISTRATION #:

20023005766

EQUIPMENT INVENTORY

<u>ITEM</u>	<u>DESCRIPTION</u>	<u>QUANTITY</u>
-------------	--------------------	-----------------

Motive Power

1980 G.E. B-30-7	3,000 h.p. road locomotive - operable - needs blue card	1 *
1942 G.E. 44 ton	380 h.p. diesel switcher - restorable - on historic register	1
1952 G.E. 44 ton	same - located at Omnitrax repair shop - Loveland, CO	1 *

Rolling Stock - Passenger

1939 Budd Stainless Round-end Observation Car PPCX-6401 w/ 35KW gen-set	1 *
1968 Budd Stainless Railway Post Office Car UP-903686	1 *

1924 Pullman Business Car - AT&SF Car 36 - Static office and quarters 1

1929 Pullman Private Car - "FRIENDSHIP" - restorable 1 *

1920's CN Pullman/Sleeper/Diner "WHITECOURT" - located in Strasburg 1

Rolling Stock - Freight

D&RGW Caboose #01423 - complete and operable - located in Alamosa, CO 1

D&RGW Box Car # - 50' double door - operable - located in Alamosa, CO 1

D&RGW Box Car # - 50' double door - operable - located in Alamosa, CO 1

D&RGW Box Car # - 40' single door PS-1 - static display - in Alamosa, CO 1

D&RGW Gondola # - 60' - operable - located in Alamosa, CO 1

D&RG Bulkhead Flat Car #2359 50' - operable - located in South Fork 1

D&RG Mill Gondola Car #0132 72' - operable - friction bearings - So Fork 1

Rolling Stock - Freight Cars, continued

D&RG Flat Car #2304 - 50' - operable - friction bearings - located in So Fork 1

MKT "Katy" Box Car #5134 - 40' - operable - maintenance equipment storage 1

UP Box Car #361139 - 60' double door - operable - storage in South Fork 1

Maintenance-Of-Way Equipment

Motor Cars and Trailers

D&RG P.C. #1 – 12 man personnel carrier – diesel powered – hydraulic drive W/air brakes, lights – in regular service	1	
Fairmont MT-19 Motor Car – 2 man car - currently undergoing restoration	1	
Fairmont A-4 Motor Car – gang car - needs complete rebuild – restorable	1	
Fairmont A-5 Motor Car – gang car – needs complete rebuild – restorable	1	
Fairmont TT – Trailer # T0001 – new	1	*
Fairmont TT – Trailer # T0002 – new – w/fire fighting tank and pump	1	*
Fairmont TT – Trailer # T0100 – w/weed sprayer tank	1	
Fairmont TT – Trailer # T0200 – w/arc welder/generator	1	*
Fairmont TT – Trailer frames only – one heavy duty – one light duty	2	

Track Maintenance Machinery

Fairmont Model "A" Automatic Spiker/Auto-gauger – in use	1
--	---

Nordberg Model "B" Automatic Spiker/Auto-gauger – operable	1
Canron/Tamper Track Scarifier – operable	1
Kershaw B-26 Ballast Regulator w/power broom – operable	1
Racine Rail Anchor Machine – operable	1
Canron/Tamper Mark II Track Tamper w/torsion beam and dollies – bad motor	1
Nordberg Power Spike Puller – operable	1
<u>Track Maintenance Machinery, continued</u>	
Power Track Wrench w/new motor	1
RMC Zapper Power Spiker – needs motor	1
Holley Pneumatic Spike Carrier w/air brakes and dump – operable	1
Power Rail Plate Lifter – operable	1
Rail Grinder – electric – operable	1
Racine Powered Rail Saws – operable	2
Stumec Powered Rail Drills – operable	2

Axsom Tie Inserter – rebuildable	1
Axsom Tie Inserters – inoperable – parts units	2
Fairmont W115-B-1-1 Tie Remover – rebuildable	1
Fairmont W115-B-1-1 Tie Remover – inoperable – parts unit	1
Axsom Rail Anchor Machines – inoperable – parts	3
Battery Boxes – new – used on all machines to secure battery	3
-	
-	
<u>Track Tools and Components</u>	
-	
65# and 90# surplus rail in 30', 33', and 39' lengths	several
65# tie plates – one pallet	300
Bridge Timber bolts – 55 gallon drum	1
Track Spikes – 55 gallon drums	20
Tie Plugs – wooden – bundles	numerous
Switch Stands	6
Switch Booms – for ice and snow removal – new	full box

Assorted Track Tools - track bars, angle bar wrenches, etc	numerous
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Track Tools and Components, continued

Rail Drill Bits - New - large assortment	numerous
--	----------

Welding Rod - New - in sealed cans	15
------------------------------------	----

Track Jacks - for lifting rail/track assembly	3
---	---

Rail Benders - for use on curves	2
----------------------------------	---

Rail Joint Tighteners - tighten rail joint gap	4
--	---

Pick Heads and Spike Mauls	numerous
----------------------------	----------

Rail Tongs - two-man manual lift	numerous
----------------------------------	----------

Crane Tongs - for use with crane or back-hoe	1
--	---

Chain Lifts	2
-------------	---

5 Ton come-along	1
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Ingersol-Rand Air Impact Wrenches - ½" ¾" and 1" drives	10
---	----

Acetylene Torch - new - w/hoses, gauges and moveable rack	1
---	---

Insulated Track Gauge Bars - new	10
Maintenance-of-way parts - assorted	numerous
Flange Oiler Heads - new - used on curves to reduce wear	7
Derail Assembly - bolt on to track	2
Rerailing Frogs - new - use to rerail cars and locomotives	2
Wooden Cross-Ties - new	25
Gauge Bars - new - used to maintain proper gauge	18
Wooden Grade Crossing - new - used to cross track at highway	1

Rail Car Parts

Car Springs - Coil - new	24
--------------------------	----

Rail Car Parts, continued

Car Springs - Elliptical - new	12
Car Brake Cylinders - new	4
Train Line Air Hoses - new	10

Hydraulic Jacks - 50 Ton Capacity - used for lifting locomotives and cars 2 *

Car Stand - Heavy Duty 1

Jack Stands - Various Capacities - 25 ton, 50 ton 8

Stainless Steel Holding Tanks - new - used w/Microphor chemical toilets 8

Brass Couplings - new - used on train lines, plumbing, etc. 100's

Bolts and Fittings - new - 3 pallets with 3' x 3' x 4' boxes 1,000's

Coach Seats - used - 1940's variety for coaches 60+

Amtrak Locomotive Seat - like new - for Locomotive #7863 1

Propane Cabinet - Under Car - w/2 bottles 1 *

Vehicles

1998 GMC 3500 Diesel Tractor - 22,000 miles - Cat diesel - 6 speed 1 *

1998 Triple-axel Trailer - fifth wheel - used with above truck 1 *

1996 Ford F250 Pick-up - 111,000 miles - excellent condition - 4 wheel drive 1 *

new tires - automatic transmission - 5.8 litre V-8

Halm Fire Truck - Complete - 6 cyl diesel - 1,200 g.p.m. pumper - 500 gal tank 1 *

Generator - all hoses - flood lights - excellent condition

Seagraves Pumper Fire Truck - 1,500 g.p.m. pump - 500 gal tank 1 *

Generator - flood lights - foam capable - all hoses V-8 diesel

JCB Tractor/Back-Hoe - w/extend-a-hoe option 1 *

Hi-Rail Equipment - to allow pick-up trucks to run on railroad tracks 3

(1) Chevy and (2) Ford

Miscellaneous

-

Cross-Bucks - Railroad Crossing Signs - new 10

Fire Extinguishers 8

Building - 50' x 110' steel bolt together - used and disassembled in South Fork 1 *

To be used as shop

* Denotes privately owned, but available to the Foundation and available for purchase.

GMCO Corporation

27316 Highway 6
P.O. Box 1480
Rifle, CO 81650

(970) 625-9100
Fax (970) 625-9101
email: gmco@rof.net

Appdx. DHS-5

November 21, 2003

Denver and Rio Grande Rail Road
Historical Foundation
1474 Main Avenue, Suite 223
Durango, CO 81301

To whom it may concern:

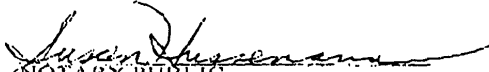
GMCO Corporation is requesting rail service to Creede, CO. We do considerable dust control work in the area and would benefit greatly by having rail service to Creede and the surrounding area. The estimated number of cars we would ship to the area is 25 per year.

Thank you.



Randy Parsons
Operations Manager

SUBSCRIBED AND SWORN TO before me in the County of Garfield, State of Colorado, this 21st day of November, 2003.


NOTARY PUBLIC

My Commission Expires:

02/05/04

BOARD OF COUNTY COMMISSIONERS

MINERAL COUNTY
P.O. BOX 70
CREEDE, COLORADO 81130
(719) 658-2331



Appdx. DHS-6

November 20, 2003

Denver & Rio Grande Railway Historical Foundation
Don Shank, President
1474 Main Avenue, Suite 223
Durango, CO 81301

Attention Don,

On behalf of the Mineral County Road & Bridge, we would like to request delivery of our magnesium chloride in tank cars by rail line to the City of Creede.

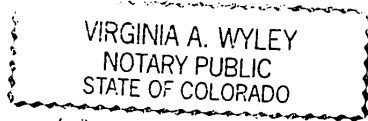
Currently, we are traveling a great distance to Monte Vista to pick up and return with the magnesium chloride. This is costing us man hours, time away from our maintenance of roads, wear and tear on trucks, etc. It would be far more convenient for us to receive our goods in the City of Creede.

Please consider our request of freight delivery by rail line. Thank you for your time and consideration in this matter.

Sincerely,

Danny Rogers
Mineral County Road & Bridge Supervisor

Subscribed and sworn to before me by Danny Rogers this 20th day of November, 2003, a Notary Public in and for the State of Colorado, County of Mineral.
My commission expires 1/11/07



11/11/2007

HINSDALE COUNTY

"Above and Beyond"

311 North Henson Street
P.O. Box 277 • Lake City, Colorado 81235
(Fax) 970-944-2650 • E-mail: hinsdalecounty@pcrs.net

Appdx. DHS-7

June 25, 2003

To: Denver Rio Grande Historical Foundation
From: Hinsdale County Government
Subject: Rail Freight Weeds – Creede Colorado

To Whom It May Concern:

Hinsdale County would very much like to see rail freight service available in the Creede area. We now have to truck about 65,000 gallons of Mag Chloride road treatment from Alamosa to the forest roads that we treat with this product.

The US Forest Service and Hinsdale County would benefit greatly if rail service was available into Creede. This dust road treatment is done at least once per year. Please allow rail service to reopen into Creede. Thank you.

Sincerely,



Robert Hurd
Road & Bridge Supervisor

AREA CODE 970

Commissioners 944-2225 Assessor 944-2224 Clerk & Recorder 944-2228 Treasurer & Public Trustee 944-2223 Sheriff 944-2291
County Administrator 944-2225 Road & Bridge Department 944-2400 Building Department 944-2319

REBUTTAL OF ADJACENT LANDOWNERS' STATEMENT

Hereby submitted is my rebuttal of the Comments submitted in behalf of "Adjacent Landowners."

Page 3 — Mr. Morell follows George Allen's lead by the free use of the term "fraudulent". Has fraud been determined by anyone? At Footnote 1, the right-of-way through the Elk Creek and Wason Ranches comprises less than ¼ of the Creede Branches total mileage and over 90% of the right-of-way through these two ranches is owned by DRGHF in fee simple. As for his statement that we misled the STB regarding continued rail freight service, everyone knew at the time that no rail operations had taken place on the line since 1985, but we stated that subject to rehabilitation, we would be ready, willing and able to haul freight, if any presented itself. As demonstrated by the letters being filed, we have requests for freight service into Creede. We misled no one.

Page 4 — Four and a half years may have passed since the STB granted the OFA, but the consummation took place in May of 2000, then the immense task of opening the line commenced. Since then countless trips by maintenance crews, on DRGHF owned m-o-w equipment have traversed the entire Creede Branch, with the exception of the Creede rail yard. His bold statements regarding our financial wherewithal at the time of purchase, etc., could be explained by the fact that our Japanese donor who did provide \$250,000 at the time of purchase had [verbally] pledged \$1.0 million towards this project. Gayle, my former wife, was sitting in the office with me when that call came in. She witnessed the elation I felt by that pledge. Mr. Morell states on page 13 that it is inconceivable that the STB would have authorized the sale on the basis of potential future donations. However, I did not list the \$1 million pledge from our major donor.

Mr. Morell is wrong in his assessment of the lack of need for freight rail service as demonstrated by our written requests. We needn't labor that issue. Those requests are *bona fide*.

Mr. Morell follows George Allen in his attack on the OFA citing failure to restore rail service and using the OFA award to commence a real estate leasing regime. As previously stated over and over, DRGHF sought to continue the leases transferred by Union Pacific as the time of consummation. There is a legitimate rental history that accompanied the closing documents.

- I want to *again* review the accusations surrounding the r-o-w lease with Ms. Louise Gray. I spoke with Louise just a few moments ago 1-7-04, 10:30 a.m. I read her the paragraph from Page 19 regarding "the depths to which Mr. Shank will go" and specifically asked her how she paid for her car. Ms. Gray is appalled by the statements contained in Mr. Allen's and Mr. Morell's filing and she explained to me that she had worked for twenty-one years and saved money from that employment to purchase her used Ford Explorer. She was adamant that it was not paid for from proceeds derived from scavenging aluminum cans. In fact she went on to say that she used her car a few times to go out and

pick up some cans but the proceeds from the "scavenging" amounted to only about **\$15.00**, a far cry from enough to pay for her car!!! Every time I read the phrase "extort monies from individuals like Louise Gray", I get outraged. During the phone conversation I asked Louise for a letter explaining exactly what we had talked about and nothing more. I said, "just tell them the truth". She is scared to death. I doubt she'll write one. The STB needs to know this is a fabrication, and a very unfair one at that. Refer to George Allen's "Record" @ page 274. I think I explained our position sufficiently.

I have NOT used the OFA award to initiate a leasing regime. The consummated sale provided an EXISTING number of r-o-w leases that were appropriate for the D&RGW, SPTC and UPRR. Why is it suddenly inappropriate for DRGHF? As for the effect the OFA is having on the community, it's a small town and its mayor, BJ Myers, has made this a huge issue and used tons of city time to make it a big issue. After all, she has an encroachment problem of her own and wants the railroad gone. She has wanted it gone since she inherited her commercial building from her mother and the lease with the UPRR. Unlike Mayor Myers, her mother [Margaret Myers] always paid her lease to the railroad. Ms. Myers wants clear title to *all* the land under her building, not just 60% of it. She wants to sell it and retire. But roughly 40% of the building rests on our r-o-w, not to mention that the City of Creede is now [as of 1901] the fee simple owner of the land under our r-o-w. How did she plan on gaining title to the other 40% even with us gone? I wonder!!

Page 5 — Has Creede satisfied the criteria to reopen the OFA? I admit that some errors may have taken place within the financial statements for myself and DRGHF. We've been over the issue regarding the inclusion of our home that was titled solely to Gayle and the railroad collections belonging to my dad, brother and me and the logic of why they weren't formally transferred to DRGHF. I admit this may have been an error, but please understand it was an honest error. Where in all of this is it taken into account that this entire venture was a first time effort in acquiring a rail line through the OFA process. I'd never been involved in something like this. Karl Morell once again follows George Allen is stating "other agenda" in acquiring OFA rights. That's nonsense! We knew all along that there hadn't been any need for freight rail service for a long time. The STB knew we were going to rehab the line, then initiate a tourist-based operation with the hopes of locating some freight business. I have located some freight business before *any* operations commenced and we hope to identify additional need, but that has nothing to do with the right-of-way leases that were already in existence. We were only pursuing the continuation of leases that had been in place by our predecessors.

Bottom of page 5 and on to 6 — We continue to rehabilitate the line. We are working through the winter as weather and frozen ground allow. We will operate a freight train a.s.a.p., subject to an FRA track certification. We have the legitimate need for service. Was there any statutory deadline for rehab to be completed or operations to commence? I don't believe there was.

Pages 6, 7, 8 — Mr. Morell's bold statement suggesting that *none* of the assets listed in the DRGHF Financial Statement were owned by DRGHF at the time of the OFA filing is patently incorrect. This begins a long and tedious depiction of what was listed in the DRGHF statement vs. what was reflected with IRS and the State of Colorado. I will try to make some sense of it.

The seven pieces of rolling stock with a purported collective value of \$48,500;

- a. 1880 D&RG Caboose — this car with trucks was in our possession and paperwork supporting its donation complete. A narrow gauge [long] Caboose in terrible condition recently sold for \$15,000.
- b. 1890 D&RG Dining Car — this car was in our inventory and the paperwork supporting its donation complete.
- c. 1903 D&RG Box Cars — the cars were given to DRGHF with no supporting paperwork. The donor stated we'd cover the paperwork when we move the cars. We haven't moved them as yet as we haven't finalized the location for the DRGHF museum facility. The donor knows the cars are DRGHF's. The donor has been a friend of mine for a long time.
- d. 1880 RGS Coach — this car was to have been donated to DRGHF. At the last moment the owner decided he wanted \$12,500 for the car. It had been listed as an asset of DRGHF as we were certain the donation would consummate. Given the absolute rarity of RGS passenger equipment, I personally paid for the car.
- e. 1880 D&RG Coach & 1883 D&RG Pullman — these cars were pledged to DRGHF years ago and remain so today. Certain things had to take place to make the cars available to us for possession. Those just took place recently. Was it wrong to have listed a pledge from people I've known for years and trust? I suppose so. Does that error equate to fraud? There was no intent.

The value given the equipment vs. the reported value is the market value vs. book value. If we gave a value of \$2,500 for a car, it was reported to the state at that amount. The asset value listed on the Financial Statement was its current market value. Had we chosen to sell the asset, we most likely would have been able to receive the listed figure at a minimum. Case in point; the 1890 D&RG Dining Car valued at \$10,000 was received as a donation. The receipt furnished to the donor for the car was for \$2,500. A similar car in similar condition located here in the San Luis Valley was sold at about the same time for \$10,000. It became a comparable supporting the value shown on the DRGHF statement.

The railroad memorabilia and artifacts listed with a value of \$65,000 and the model railroad collections valued @ \$152,000 are partially in the possession of DRGHF, my father, my brother and myself. We still do not have a suitable location for the museum we intend to develop and display everything. It remains far easier to house the collections in their present locations, which provide insurance coverage by the respective donors. They are safe and secure. Now, again, was

it an error to have listed these collections on the DRGHF statement? Probably so, but I trust my father and my brother. These collections aren't going anywhere. Does this constitute fraud?

There seems to be a rather significant discrepancy between the schedule of assets presented to the UPRR/STB and what was reported on our tax return and property declaration. In discussing this with our bookkeeper, she reminded me that through the IRS audit prompted by the opposition, corrections were made to our Form 990 and this changed the Property Statement. This is all totally explainable. The changes and adjustments were made as suggested by IRS. We fully complied.

The cash and cash equivalents totaling \$23,294.07 was correct as of November 30, 1998. Mr. Morell also refers to the 7.37 acre parcel of land in Silverton donated to DRGHF. The land had been appraised by a professional real estate appraiser and valued @ \$34,000 at the time of donation. The donation took place during 1998, but didn't hit our books until January 1999. To substantiate this I checked with the San Juan County Assessor's Office in Silverton today 1/7/04 and they verified change of title recording into DRGHF on November 10, 1998, Book 246, Page 964. The land is still an asset of DRGHF. The land was listed for sale at one time but we took it off the market as land values in Silverton were steadily climbing. It remains a convertible asset of which we continue to pay property taxes on. As to why it isn't on our Property Declaration, this dealt with the audit.

In his summary Mr. Morell again emphatically cites fraud in my filings. He paints a bleak picture as to the real net worth of DRGHF. His figures aren't even close. I may have included some assets that hadn't formally transferred, which in retrospect was an error in judgment on my part, but not with the intent to commit fraud. BUT, think about this: our foundation is not unlike most charities or even churches. They are all dependant upon pledges. Those pledges sometimes materialize into donations and some never materialize at all. However, a charity's budget for the future is based upon those pledges and often times they fall short. This is not unlike our Japanese Billionaire that pledged \$1 million to DRGHF and then funded \$250,000 that was sent to the UP.

Page 9 and 10 — On to my personal financial statement. Mr. Morell states that DRGHF's net worth, ("even at the fraudulently inflated level") fell well short of the Net Liquidation Value ("NLV") of the OFA line and that I pledged to donate \$400,000 to DRGHF. We've been over this before with our bookkeeper Denise Jackson. I have funded to DRGHF \$506,000 between 1999 and 2002. Obviously a portion of the \$506,000 was in the form of expenses for fuel and repairs for the maintenance equipment operation, as well as fuel, lodging, food, trips to auctions, legal and professional costs, and plenty of intangibles, which wouldn't necessarily appear on a Property Declaration, but a big chunk of the \$506K did.

Mr. Morell refers to the August 3, 2001 deposition and my refusal to answer questions of a financial nature. At that time I was instructed by my attorney, Ray Micklewright, to do so. At that time the district court was not allowing George Allen that kind of latitude. In fact at one of the district court hearings the presiding judge made a bold statement: "if the Foundation [DRGHF] was comfortable with Mr. Shank's pledge, who are you to question it?"

Mr. Morell adeptly reconciles the financial picture comparing the OFA filing to my California divorce judgment. He shows that property held by me was listed on the OFA but no value given in the divorce judgment. Gayle and I simply agreed that she would take *our* home and I would take our Colorado properties. Ironically the properties referred to by Morell are shown as: (1) an interest in Air Park Village, with a stated value of \$250,000, and; (2) the Highway 160 acreage with a stated value of \$450,000. Both sold, or are about to close, for the amounts reflected. The 22 acres in the Hwy 160 acreage sold a few years ago for \$445,000 and the Air Park property has been under contract for over a year and is due to close in mid-February. My gross share from that sale should be around \$250,000.

My financial picture truly went downhill in late 1999. The investment [on the Nov. 1998 statement] I made through/with Jeffery Matz, a Phoenix, AZ, attorney, turned out to be in a "ponzi scheme" and I lost \$80,000 of the \$100,000 investment and the supposed earned profits of \$87,500 as of 3/20/99 were never there. Jeffery Matz is in federal prison, as well he should be, but I lost big. The real unfortunate side of this was it set up the domino principle. I was forced to restructure debt as it became due and would eventually sell properties with a big reduction in net proceeds.

I reviewed my personal financial statement as provided to the STB during the OFA. Taking into account the errors I made, I can make adjustments to the statement and I arrived at a realistic Net Worth that would probably survive the oppositions scrutiny of just under \$1 Million Dollars, at that time. That is nearly \$620,000 less than reflected in the 3/15/99 statement, but well above Mr. Morell's suggested "marginal net worth at best at the time of the OFA." The major reduction came from backing out the value of our personal residence, however, I also credited the mortgage debt. There were a few other adjustments. The adjusted total assets are \$1,270,100 vs. \$1,957,600 as given to the STB. The adjusted total liabilities are \$298,800 vs. \$366,431 and my adjusted net worth was \$971,300 vs. \$1,591,169 or \$619,869 less than provided to the STB in 1999.

@ footnote 22, I did enter into a Stipulation In Lieu of Judgment with a creditor. It was a disputed matter that I failed to take care of and it had gone far further than I had any knowledge of. It was paid off entirely soon thereafter, but it did become a matter of record.

Page 11 - During the time we were purchasing the railroad a gentleman in the Intermodal Department of the Colorado Department of Transportation ("CDOT") felt he would be successful in assisting DRGHF in securing a \$1 million grant for rehabilitation of the Creede Branch. He was adamant that this could be accomplished. Not knowing or understanding the procedure and taking this gentleman at his word, I conveyed this to the UP's Real Estate Department. This was also conveyed to the STB during our filing. I suspect it could possibly have come through the "Enhancement Program" which administers federal funds at the state level through municipalities, such as South Fork. At that time we had never heard of the Enhancement Program nor did we have a clue to the inner workings of CDOT. This program sounded great so why would we dispute it.

At the bottom of page 11 and on to page 12 — Mr. Morell follows Mr. Allen's lead by restating the cardinal sin created by me signing my name to documents prepared by Terry Whelan of South Fork in an attempt to secure funds through the Enhancement Program with CDOT. However, I have discussed this situation with the DRGHF Board of Directors and we contend that we were correct in estimating the initial cost to get the track minimally acceptable to the FRA in order to operate a freight train. The key here is minimally acceptable. What we were potentially going after through the Town of South Fork and Terry Whelan was something we could have hoped for. Getting the line minimally operable would allow us to generate some revenue that could be reinvested into track improvement. Those improvements would have and most likely will be carried on for years to come. The grants from CDOT would have simply accomplished this far quicker and to a greater extent than any of us could have hoped for. Is \$10 million needed to rehab the line to make it minimally operational? No! But it sure would be nice to have track better than it has to be as opposed to better than it needs to be.

At footnote 29, Page 12 — Mr. Morell is overly presumptuous by assuming DRGHF was short on funds, therefore delaying the closing on four (4) separate occasions. Legal issues that had to be cleared up prior to the closing were the real reason. Mr. Morell and Mr. Allen never miss a chance to paint as bleak a picture as possible. Once again, they are wrong. At this moment I don't recall exactly what the last issue was, but it cleared-up on the morning of May 24 2000 and we closed at 4:30 p.m. that same day.

At footnote 30, Mr. Morell refers to a statement I made to a reporter in December 2000, "The Note payment issue to the Union Pacific for the year 2000 is resolved . . ." I told the reporter exactly what I discussed with the UP and we [UP/DRGHF] strategized how we would inform the press. I specifically stated that, "the payment issue for 2000 has been resolved and I look forward to next year and retiring the debt." No inference was made that a payment had been made, period. I was very careful not to misrepresent the situation. John Bromley, Public Information Officer for UP, was not notified by the legal and real estate departments and he stated that the payment hadn't been made but instead the note had been extended. It wasn't what UP/DRGHF had agreed to publicly release, but absolutely no misrepresentations were made by either side regarding the note payment.

Pages 13, 14 — Mr. Morell makes some bold accusations by suggesting that I switched stories. It is no mystery that my financial situation changed. The loss of my \$100,000 investment principal as well as the investments earnings of \$87,500 to Jeffrey Matz had a profoundly negative effect. I clearly was relying upon that investment to make the note payment. Mr. Morell asserts that donations dried up before the Nov. 7, 2000 filing of the suit. That loss and Jeffrey Matz conviction and incarceration are a matter of record in Arizona.

The negativity and opposition publicly voiced by the Creede opposition was being heard across the country prior to the suit. We were plagued by one complaint after another at the hands of Creede's mayor. She was creating problems early on with various agencies like the Colorado Public Utilities Commission ("PUC"), Corp of Engineers, Forest Service, etc. These complaints were making the newspapers in a big way. Even Ken Salazar, Colorado Attorney General joined in the fight and made the bold [but incorrect] statement that "the right-of-way was abandoned"

and plastered it on the front page of numerous newspapers. Although we were certainly correct in righting the wrong, it ultimately cost us dearly. DRGHF and I were quietly being blacklisted with various agencies, such as CDOT, that could have potentially helped us. Even in retrospect, we had to respond.

After adjusting my financial statement from 1999 that I submitted during the OFA, I think it should still reflect a net worth that would have been deemed sufficient at that time, though my liquidity was really hurt by the loss. Wouldn't this have some bearing on whether or not fraud was in fact committed? Doesn't intent need to be present? There was no intent!

Pages 15, 16 — These pages deal with Mr. Morell's perception that no freight business exists and refers to our "artfully crafted words", obviously our statement of ready, willing and able. We remain willing, and will be ready and able upon completion of the rehabilitation. Nothing has changed. However, we have acquired an operable 3,000 h.p. diesel locomotive. I purchased one with four-wheel trucks to better handle our tight-radius curves. We also have a nice steel caboose to follow behind, something you don't see much of anymore. Please refer to the DRGHF Inventory of Equipment filed in this proceeding. It should be readily apparent that we have acquired quite an arsenal of equipment to rehabilitate and operate our railroad. The significant investment associated with that equipment should send a clear message that we intended to operate this line as opposed to just initiating a real estate leasing regime. That highly presumptuous theory will not stand the test of time. We have a certified engineer/conductor/maintenance-of-way professional and a former conductor ready to go to work. In addition to those on staff, we have a file with several experienced railroad professionals seeking employment.

This may be repetitious but here goes. We knew going into this purchase that nothing existed in the form of freight business on the line. We knew the line was in tired but restorable condition. We knew that Creede had transformed from a mining town to a tourist-based economy. We felt that a tourist-based passenger operation augmented by freight rail service might have a good chance of success. Our initial plan was to get some form of limited passenger operation going and continue to identify any potential need for freight. Through my efforts I fortunately identified a shipper and two recipients requesting product delivery in Creede prior to any commencement of passenger operations. We will continue our rehabilitation efforts and provide service at our earliest opportunity. Again, we didn't want to get the cart ahead of the horse by offering service we couldn't deliver. Our shipper is aware that we are still in rehabilitation mode.

Bottom of page 16 @ footnote 42 — What a waste of time and paper. We knew the request was absurd and therefore we did not pursue it.

Page 17 — Mayor Myers may have listed every business in Mineral County, but she didn't give Mineral County's Road and Bridge Department any consideration. They want their magnesium chloride delivered into Creede and so does Hinsdale County. DRGHF is happy to oblige as soon as we can. As for the only possible exception, Tomkins True Value Hardware and Lumber, well they don't have any need for rail service because the entire lumber yard and 1/3 of their retail store are located in the middle of the rail yard, and they would like to see us gone as opposed to

paying rent. Tomkins True Value Hardware used to pay a lease to the D&RGW, SP and UP but chose to join the mayor's opposing group and take advantage of a non-profit charitable organization, DRGHF.

Mid-way, page 17 — Thank you Mr. Morell for your overwhelmingly positive vote of confidence. Leave us alone and let us try! We've never been able to get that far. The Creede opposition has thrown up every conceivable roadblock to derail this project since the day we closed.

As stated so eloquently by Steven Wardell during a special meeting of the Mineral County Commissioners, "what has happened as a result of BJ Myers and her group is down-right un-American. DRGHF is not even being allowed the opportunity to fail, let alone succeed. This is fundamentally wrong". He also prefaced that statement with this: "Last night I looked up the definition of the words *free* and *enterprise*. I merged the two together and drew this conclusion:" County Commissioner Wardell hit the nail on the head. These statements were made during the special meeting in which the Board of County Commissioners voted unanimously to support and endorse the DRGHF and the resumption of rail service.

Bottom of page 17 and on to 18 — "The Coalition's concern isn't rail operation, but rather my harassment inflicted upon Creede." Oh give me a break! First of all, The Coalition is made up of two ranches. The Wason Ranch is a huge guest ranch located 2 ½ miles below Creede. We own the right-of-way through the entire ranch, in fee. We pay taxes on it, as have our predecessors. This is the ranch/company that Joe Burkett was once the head of. He got kicked out of the ranch after many years of Burkett family ownership. The Wason Ranch Association bought him out after his repeated misrepresentations on behalf of the Association.

The Elk Creek Ranch is located just barely out of South Fork, about 18 miles from Creede. Elk Creek is the group that attempted to have us arrested for trespass while on the railroad the first time. They also claimed that virtually all our predecessors called in advance seeking permission to enter the ranch. That is utter nonsense.

Mr. Morell's repeated use of the word "extort" continues at the top of page 18. This page contains eight examples of alleged "unbecoming conduct" on my part and each needs to be addressed.

1. On a Saturday in August, about three years ago, the DRGHF crew drove some metal "T" posts within our right-of-way, near the edge and posted "private property" and "no trespassing" signs on the posts. Then we ran one strand of nylon twine around the perimeter. This took place within the Creede rail yard. We absolutely did not place any barricades in any streets, nor prevent any citizens from utilizing any streets. Our only purpose for erecting temporary boundaries was because we intended to work in the rail yard and didn't want the public at risk, period.
2. This temporary "fence" took us nearly the entire day to erect. We left to go to dinner and returned within an hour only to find our days work trashed. The posts were all bent to the ground, the signs crumpled and the twine cut-up and shredded. Needless to say, we were quite upset. I

promptly called the Sheriff's Office and filed a report. He [Sheriff Leggitt] located six individuals that had been directly involved and issued complaints. Mr. Morell's accusation here would make you think that these fine citizens were simply out for a stroll on the streets of Creede and I wrongfully had them cited. These people did real damage. I dropped the charges just before the holidays as an act of goodwill. That gesture came back to bite me. They contend that I had no grounds and they should have gone after me. So much for goodwill.

3. "Aggressively sought to extort"? There's that "E" word again. I simply used a similar form letter that had been used by my predecessors that states; "Please execute within thirty days. If you choose not to continue leasing that portion of the right-of-way, please make arrangements to vacate." As for extorting lease payments from adjacent land owners that traverse the right-of-way to access their home, you know who he is talking about, Louise Gray. Asked and answered. The other leases are to businesses that historically had leases and we simply intended to continue with them. Need I say more? In this case, YES. Please refer to footnote 47. Here Karl Morell asserts the limitations as to the railroad's ability to lease right-of-way within Section 36. Through he doesn't refer to this area as Sec 36, he identifies it as the right-of-way in South Creede granted by the 1969 Indenture that gave the railroad an easement over state owned land within Creede. This is not difficult to figure out. South Creede, within SEC. 36! **I am not demanding lease payments from anyone encroaching on this portion of the right-of-way, period!!!!** As a matter of record, we went over this at the February 22, 2000 hearing in Denver. In addition to the Colorado State Land Board Staff and Pat Wilson from the Colorado Attorney General's Office, the meeting was attended by Bob Opal, counsel for Union Pacific, Chuck Barnes, the former mayor of Creede, Merle Knous, current Creede Council Member and former U.S. District Judge, myself, and a few other interested parties. As a result of that meeting it was determined that the Union Pacific would repay the CO State Land Board several thousands in inappropriately collected rents. To this day DRGHF doesn't collect a dime in SEC 36, nor would we attempt to. Mr. Morell would like to make the STB think we are violating the terms of the Indenture. That's obvious by his brash statement; "Notwithstanding this express limitation, Mr. Shank is demanding lease payments from anyone encroaching on this portion of the right-of-way even though there is no nexus between the encroachment and railroad business." This is absolutely incorrect!

4. If you fail to renew the lease, fail to pay rent for its use, yet continue to occupy property belonging to someone else, wouldn't eviction constitute the next logical action? DRGHF has not evicted anyone, ever. The threat is apparently implied by the standard form letter that accompanied each lease. Sign or vacate within thirty days. What else should have been provided in the letter? Please sign if and when you feel like it or stick around for free for the next few years. That's what they have done!

5. This is a gray area. When CDOT refused to honor the Grade Crossing Agreements from 1958 and '59, I had a discussion with Jack Baier of the CO PUC. Jack asked; "Would you like to commence the paperwork to shut down Hwy 149?" I asked if that was an option. Jack stated that if they chose not to honor or recognize the crossings, and since we [the railroad] had pre-dated the highway by seventy years, they obviously didn't want to continue crossing the railroad. I

referenced this in a letter to CDOT that prompted a response [see Creede Document at 413, next to the bottom paragraph] from Tom Norton. CDOT was attempting to claim that the Crossing Agreements were unenforceable as they failed to identify an expiration date. They changed their thinking, but it created yet another issue.

6. This complaint made it to the STB. The complainant made it sound as if we were denying the public access to public lands. The dirt road Mr. Morell refers to was literally two ruts through the weeds that approached the railroad track. Someone had attempted to build a crude grade crossing by throwing some rock and dirt between the rails to get to the river that is all of maybe 75' beyond. A camper from Texas tore out his oil pan and another ripped off the slid plate from his transfer case while bouncing over the tracks. They were also damaging our ties. We dug out the rubble between the rails and drove two metal posts about eight feet apart, hung one strand of twine between and attached a "no trespassing" sign to it. This was never an approved crossing. As for denying access, give me a break. You could literally walk for 1,000' in either direction, uninterrupted, and cross the tracks by foot and camp by the river. People continue to camp in this area, quite often, but they don't try to drive across our track, as they shouldn't. We have had not one request from the Forest Service for a grade crossing throughout this entire stretch. Not one!

7. This is the situation as identified above at (1). The parking lot is the railroad's yard. Years ago that parking lot was allowed to be in the yard via a right-of-way lease. The city stopped paying this lease years ago. At the insistence of the CO State Land Board, I cancelled it. The playground also sits in our rail yard and never had authority to be placed there. It is potentially dangerous and will be moved to a safer location. We planned on helping.

On to page 19.

8. This is a quite interesting. The drainage ditch that's been located on the right-of-way for over 100 years? It may have been in our right-of-way as we have a 75' width on that side of the track, but it most definitely was not directly next to our track until the City of Creede relocated it. Mineral County Sheriff Phil Leggitt, who has lived in Creede his entire life and grew up a stones throw from the ditch said this is not true. This drainage ditch is now undercutting the ties. The structural integrity of the roadbed has been compromised. The ditch used to meander like a snake down through this area. Now, because the city built a ballfield, that encroaches on the right-of-way, they placed a concrete retaining wall made of interlinked "jersey barrier" that parallels our track, but unfortunately on the wrong side of the ditch. For the record, DRGHF does not intend to make an issue regarding that encroachment. Mineral County Road and Bridge had made an offer to install a new culvert that would incorporate the ditches entire flow within the new culvert pipe and then bury it. Even better, they were willing to pay for it themselves. The city [BJ Myers] got in the way and stopped it. She had absolutely no right to do so, but she infuriated the County Commissioners and they withdrew the offer. So who lost, the city, the county, the railroad and the Creede School District. We had suggested a lease between the State Land Board and the School District for use of thirty-five feet of our right-of-way as a running track. This would have been between the twenty-five foot setback from our tracks and the ballfield. This reclaimed area would have worked perfectly for this.

9. We didn't disrupt anything, including the capped area. What we did is remove a small amount of fill material that had been brought in years ago from an outside source that assured its non-contamination and used the material to cover the tracks in four locations. The company that was contracted with to "cap" the contaminated mine tailings needed some temporary grade crossings to access the area. The fill was left on top of the tracks. DRGHF crews came in with a "skidster" and simply shoved the clean fill material next to track and roadbed, never getting remotely close to the outer edge of our right-of-way. The skidster was a rented piece of equipment and it had gotten late in the day so we finished under headlights. Because we worked late, certain members of the community thought we were trying to hide what we were doing. A formal complaint was made by Creede to the U.S. Army Corps of Engineers. The complaint was lodged in the regional office in Albuquerque and forwarded to the district office in Pueblo. I was contacted by a Corps investigator/compliance officer and a site meeting was arranged. It was determined that DRGHF had done absolutely nothing wrong. We were not out of our right-of-way, hadn't disrupted a thing and didn't get anywhere close to the historic high-water level. In fact the investigator apologized for wasting my time and that of Zeke Ward, Chairman for the Willow Creek Reclamation Committee, and further stated that the complaint had wasted nine hours of taxpayer time and money for her to attend. This wasn't a total waste of time though, Diane, the investigator, felt bad that I had driven from Durango to attend and offered to assist by expediting any 404 permits DRGHF may need.

Page 19 is full of yet additional absurd accusations. Creede's financial standing and ability to raise money are threatened because of the OFA award? This is nearly as ridiculous as the second statement that DRGHF is threatening citizens and business owners with the loss of their homes and businesses. We haven't threatened anyone. I suppose someone could conceivably interpret the cover letter that accompanies our right-of-way lease as threatening, but not to the extent Mr. Morell is suggesting. Again, the letter was one used for numerous years by our predecessors, just placed on our letterhead. I wonder if the Union Pacific has been referred to as an "extortionist"?

I am totally in the dark as to how DRGHF could be held responsible for two failed sales of businesses. Of course if the City of Creede had not created this huge turmoil over the commercial leases that had been in existence for years prior to our purchasing the line, we suspect much of the unrest in the community would never had started. We are always amazed at how much controversy and concern the mayor initiated and perpetuated, only to shift the blame to DRGHF.

Mid-page 19 — I've addressed the Louise Gray issue in about every way I can think of other than to suggest to the STB, pick up the phone and call the dear lady. Her number is readily available. We have a nice comfortable working relationship with her. From day one on her lease, DRGHF has waived the insurance requirement. We work with her and we get along great. During this past December she contacted me with concerns over her 2004 lease payment and her difficult financial situation, so we waived the payment. I told her if she is doing any better next year that I'd be happy to place her on a monthly payment schedule. She appreciated everything and sent me a really nice Christmas card thanking me for being understanding and then simply signed, Louise. Would she send a Christmas card to an extortionist? She may be a senior citizen, but she's not a fool.

CONCLUSION: (in response to Mr. Morell's)

The Creede Documents have brought to light that perhaps I made some innocent errors during the compilation and submission of financial information to the STB. There was no intent on my part to defraud anyone. How the continuation of existing leases with businesses that benefit directly from the availability of railroad right-of-way and have for decades prior to DRGHF's purchase could be considered "extortion" must be recognized as totally absurd.

DRGHF has filed *bona fide* requests for legitimate freight rail service *into* Creede. Those requests are readily verifiable. Creede hasn't lost any streets or the use thereof by, or at the hands of DRGHF. They *have* refused to remove asphalt placed upon grade crossings and refused to honor crossing agreements. The children's playground will be moved from the Creede rail yard to a far safer and more, user-friendly location. DRGHF has contended all along that the railroad yard will have a park-like appearance provided by our rehabilitation. And Louise Gray, I'm confident we will continue to enjoy our excellent working relationship in the years to come.

CONCLUSION: mine

For the past four + years I/DRGHF have endured the most outrageous onslaught of unprofessional behavior by certain members of the City of Creede's political machine and a handful of misguided local residents. Nearly seven years ago I personally founded the Denver & Rio Grande Railway Historical Foundation, applied for and successfully received its non-profit, tax-exempt status from IRS, assembled a team of loyal, diligent and hard working volunteers, acquired numerous historic pieces of railroad equipment, artifacts, memorabilia and one very historic 21.7 mile right-of-way known as the Creede Branch. Months of work were spent on preparing the nomination of the line to the State and National Historic Register and I'm proud to say it is listed as a National Historic District with the Department of the Interior. The Creede Branch is a vitally important and tangible asset in understanding the history surrounding the development of Creede and the surrounding area. This line served the community well for nearly a century and was the single most important vehicle for movement of the rich ore that was the catalyst for the town's growth.

If it is determined that some innocent mistakes were made by me in the manner in which I prepared financial documents to support this historic purchase, then I accept full responsibility for those mistakes and the effect they may have on this endeavor. I tried my best to accurately depict all aspects of our ability to adhere to the rules and regulations surrounding the purchase of OFA rights. I thoroughly enjoyed my dealings with the Union Pacific Railroad and hold their very professional staff in the highest regard. In similar fashion, our dealings with the Surface Transportation Board were a rewarding and positive experience. Our Foundation has survived the legal maneuvering of every kind and nature that has been thrown at us from what simply must be identified as a very selfish, self-centered, spiteful, vengeful and vindictive person, Betty Jean Myers, the mayor of Creede. Fueled by an encroachment problem all her own, she has taken what should have been a personal disagreement and used and abused her office to make it a public slaughter of what should have been a positive, productive re-introduction of rail service and the preservation of one of Colorado's most historic rail lines. Instead she assembled and encouraged

a group of "nimby's" [not in my back yard] and a few business owners, locally referred to as "trust babies", and sought funding from some wealthy Texas oil money, to oppose the railroad in every low and underhanded manner available to them. Powerful attorneys were retained with the simple instructions to kill the railroad and run Shank out of town.

The Foundation has been ridiculed, written about repeatedly from an extremely negative perspective, and plagued by the repeated formal complaints to agencies such as the Public Utilities Commission [twice], Army Corps of Engineers, Forest Service/Bureau of Land Management, Federal Railroad Administration and now the Surface Transportation Board. Each and every time, these complaints and the horrendous allegations surrounding them have proven baseless and groundless. DRGHF has been exonerated each and every time, often accompanied by apologies from the respective agency. The harassment didn't stop there. The mayor and her group of supporters hired a private investigative firm from Denver to delve into every aspect of my personal and professional life only to produce a document written from as negative a perspective as humanly possible, then run an ad in the newspaper inviting anyone and everyone to "come and read all about him, pick up your copy at City Hall."

The most recent and a prime example of the how the mayor has manipulated agencies came during 2002 and 2003 and involved the PUC. Mayor Myers and the Creede City Council determined that a new drainage system was needed for the town. They sought input from the community requesting a brief explanation of each property owner's problem with pooling or standing water or other drainage issues. They took the information received and sought financial assistance for the design and construction of a new system from the Colorado Department of Local Affairs (DOLA). A multi-hundred-thousand dollar grant was awarded to the city and a professional engineering firm in Denver known as McLaughlin Water Engineering, Inc. was engaged. This is where things could, and should have gone differently. The engineering firm was told to "disregard the railroad". That statement was later verified to me by the firm's C.E.O., Ron McLaughlin.

Moving from the design phase to the systems installation, no contact or input of any kind was made or sought with DRGHF. In fact, DRGHF was not made aware of the system until numerous components of the system had already been installed. These components were referred to as Projects # 1 through 9. Of the nine areas receiving drainage facilities, seven were within DRGHF right-of-way and of the seven most of these improvements directly impacted our track and roadbed. The mayor even went so far as to tell the excavation contractor to sever and completely remove not one, but two tracks at a crossing in the city for the installation of this system. This even included our main line. When I confronted the excavation firm, the project manager personally stated to me that the mayor, B.J. Myers, had told them to remove the tracks and she would deal with the railroad at a later time.

DRGHF filed a number of complaints with the Mineral County Sheriff's Office and the District Attorney's Office prompting the city to file a formal complaint with the PUC and had the audacity to refer to us as "obstructionists". How dare we stop this project that was so beneficial to Creede. The system created numerous problems, some of which were potentially serious and could have washed-out our roadbed during a hard rain and heavy run-off, not to mention, had we

simply let them continue with the systems installation, we would have lost the use of the rail yard via a non-authorized forced abandonment. The design engineer, Creede's City Manager and myself spent about half-an-hour walking and talking and identified the remedy for all the damage to the railroad. The three of us all agreed that the railroad should have been included in the design phase and virtually all aspects of the system that involved our right-of-way. This blatant disregard for the railroads property rights ultimately wasted significant time, money and expertise and not unlike numerous similar situations prior to this one, is highly counter-productive.

The loyal members of our core group that work endlessly have been spit at, had things thrown at them, been photographed from people hiding behind trees, from passing cars. I have even had one misguided person with a disposable camera follow me around snapping picture after picture including one about two inches from my face, telling me to get out of her town, only to find that she doesn't even live in town. But as frustrating, painful, irritating, aggravating, costly and counter-productive as all this has been, we have progressed, certainly not as quickly as we could have, but we continue to move forward through adversity. DRGHF has made countless friends and received well wishes from many loyal supporters *in Creede*, South Fork and throughout our country. The business community within Creede contains many who support our project. This even includes some within the encroachment area, just a few doors from the mayor's store. The owner of one of those businesses and I have sat and talked on a number of occasions. He is most anxious for us to commence operations. He also felt that a lease for that portion of our right-of-way that he occupies is justified and he was expecting to sign one in the near future.

Through all that the opposition has thrown at us, we continue to move towards operating the historic Creede Branch. We only ask for the opportunity to do so without having to fight every inch of the way and constantly look over our shoulders. If we fail, let it be because we gave it our best and just couldn't make it work, not because we were forced to fail by a selfish outside source.

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2004, I served the foregoing document, Reply In Opposition To Petition To Reopen Decision Served May 11, 1999, on George M. Allen, 206-A Society Drive, Telluride, CO 81435, Karl Morrell, Ball Janik LLP, 1455 F Street, NW, Suite 225, Washington, DC 20005-1004 and Robert T. Opal, Union Pacific Railroad Company, 1416 Dodge Street, #830, Omaha, NE 68179 by UPS overnight mail.

Thomas F. McFarland

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